No. 09-664

In the Supreme Court of the United States

LUIS ENRIQUE ARAMBULA-MEDINA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals that lacks jurisdiction to consider a petition for judicial review challenging the merits of a final order of removal nonetheless has jurisdiction to review the Board of Immigration Appeals' intermediate procedural decision to resolve an administrative appeal by means of a single-member affirmance without opinion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 572 F.3d 824. The orders of the Board of Immigration Appeals (Pet. App. 10-11) and the immigration judge (Pet. App. 12-44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2009. On October 1, 2009, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including December 7, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien who has been ordered removed from the United States by an immigration judge (IJ) may

appeal the IJ's order to the Board of Immigration Appeals (BIA or Board). See 8 C.F.R. 1003.1(b)(1)-(3), 1240.53(a). Before 1999, administrative appeals from the removal orders of IJs were heard by three-member panels of the Board. On October 18, 1999, however, the Attorney General adopted new regulations, which were further amended on August 26, 2002, to streamline the appellate process. See 64 Fed. Reg. 56,135 (1999); 67 Fed. Reg. 54,878 (2002).

Under the streamlining regulations, all appeals to the Board are assigned to a single Board member for screening and disposition "[u]nless a case meets the standards for assignment to a three-member panel under [8 C.F.R. 1003.1](e)(6)." 8 C.F.R. 1003.1(e). The Board member determines the existence of circumstances warranting assignment to a three-member panel —which include the "need to settle inconsistencies" among IJ rulings; establish precedents construing laws or regulations; and the need to resolve a case of national import, 8 C.F.R. 1003.1(e)(6)—after the transcript has been prepared and the appeal briefed. 8 C.F.R. 1003.1(e). If the Board member determines that the appeal does not warrant consideration by a three-member panel, the Board member next determines whether the appeal should be affirmed without opinion under 8 C.F.R. 1003.1(e)(4) or resolved via a brief single-member decision under 8 C.F.R. 1003.1(e)(5).

In particular, Section 1003.1(e)(4) provides that affirmance without opinion is appropriate if the case is "squarely controlled by existing Board or federal court precedent and do[es] not involve the application of precedent to a novel factual situation," or "[t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion."

8 C.F.R. 1003.1(e)(4)(i)(A) and (B). When the BIA affirms without opinion, "an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the [IJ] or the Service were harmless or nonmaterial." 8 C.F.R. 1003.1(e)(4)(ii). The IJ's decision becomes the final agency determination, and the court of appeals reviews the IJ's decision as it would a decision of the BIA. See, *e.g.*, *Lanza* v. *Ashcroft*, 389 F.3d 917, 925 (9th Cir. 2004).

b. The impetus for the streamlining reform was an explosive increase in the Board's caseload. See 64 Fed. Reg. at 56,136. Between 1984 and 1998, the number of new appeals and motions before the Board increased from 3000 annually to 28,000 annually. *Ibid.* Faced with such a staggering increase, the Board's ability to accomplish its mission—"to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws"—had been compromised. *Ibid.* To ameliorate that problem, the Attorney General implemented the system of streamlined appellate review. The system is premised on the recognition that "in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal." *Id.* at 56,135. The result is a system that enables the Board to render decisions in a more timely manner, while husbanding its limited resources. See *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) ("[T]he agency adopted regulations that would allow it to focus a greater measure of its resources on more complicated cases.").

2. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is present in the United States without being admitted or paroled is removable. 8 U.S.C. 1182(a)(6)(A)(i). The Attorney General, in his discretion, may cancel an alien's removal if the alien meets certain eligibility requirements. 8 U.S.C. 1229b(b)(1). To be statutorily eligible for cancellation of removal, the alien must meet certain criteria, which include establishing good moral character, continuous physical presence in the United States for at least ten years, and "exceptional and extremely unusual hardship" resulting "to the alien's [United States citizen or lawful permanent resident] spouse, parent, or child." 8 U.S.C. 1229b(b)(1)(D). In addition to satisfying the three statutory eligibility requirements, an applicant for cancellation of removal must establish that he warrants such relief as a matter of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998).

b. The INA generally authorizes "[j]udicial review of a final order of removal." 8 U.S.C. 1252(a)(1). Since 1996, however, the INA has barred judicial review of certain discretionary decisions made by the Attorney General, 8 U.S.C. 1252(a)(2)(B), including the denial of an alien's request for cancellation of removal under Section 1229b, see 8 U.S.C. 1252(a)(2)(B)(i). See generally *Kucana* v. *Holder*, No. 08-911 (Jan. 20, 2010), slip op. 3 & n.2, 11, 12-13. In 2005, Congress qualified this jurisdictional bar by providing that Section 1252(a)(2)(B) does not preclude review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

2. Petitioner is a native and citizen of Mexico who illegally entered the United States at or near El Paso, Texas, on or about December 23, 1991. Pet. App. 2, 13. In October 2006, the Department of Homeland Security

(DHS) initiated removal proceedings against petitioner, charging him with removability under 8 U.S.C. 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled. Pet. App. 2, 13. Petitioner conceded that he is removable as charged, and sought relief in the form of cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. 2-3.

Petitioner's hearing on his application for cancellation of removal took place on August 23, 2007.[1] Pet. App. 4. On November 15, 2007, the IJ issued a written opinion denying petitioner's application. *Id.* at 12-44. Assessing the evidence of record under three precedential Board decisions explicating Section 1229b(b)(1)(D)'s requirement that petitioner establish that removal would result in "exceptional and extremely unusual hardship" to a qualifying relative, see *In re Monreal*, 23 I. & N. Dec. 56 (B.I.A. 2001), *In re Andazola*, 23 I. & N. Dec. 319 (B.I.A. 2002), and *In re Recinas*, 23 I. & N. Dec. 467 (B.I.A. 2002), the IJ concluded that petitioner had failed to establish that such hardship would result to his legal permanent resident mother. Pet. App. 31-42.

Petitioner appealed the IJ's decision to the Board, contending that the IJ erred in holding that his removal would not result in "exceptional and extremely unusual hardship" to his mother. Administrative Record 6-12 (A.R.). Petitioner further argued that the IJ failed to properly apply the Board's decisions in *Monreal, Andazola, and Recinas*. A.R. 12-16. On November 24, 2008, the Board affirmed the IJ's decision without opinion. Pet. App. 10-11.

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[1] The record in this case consists of testimony from petitioner and five witnesses, as well as numerous documents proffered to support petitioner's claim that he satisfied all of the statutory requirements for cancellation of removal. Administrative Record 65-381.

3. a. Petitioner filed a petition for judicial review of the Board's decision. Petitioner's primary contention was that the IJ's denial of cancellation of removal violated petitioner's right to due process because it was based on erroneous factual findings and the IJ incorrectly applied Board precedent. Pet. C.A. Br. 18-19. In addition, petitioner argued that his due process rights were violated because "the BIA summarily dismissed his appeal 'without commenting or otherwise addressing any of the identified issues.'" Pet. App. 7 (quoting Pet. C.A. Br. 16).

b. The court of appeals dismissed the petition for lack of jurisdiction under Section 1252(a)(2)(B)(i). The court first observed that its jurisdiction was limited to reviewing "constitutional claims and questions of law." Pet. App. 7 (citation and internal quotation marks omitted). Petitioner, the court noted, had accordingly attempted to frame his arguments as due process challenges to the IJ's decision. *Ibid.* The court rejected petitioner's due process arguments, holding that petitioner's right to due process was not violated because he lacked a "liberty or property interest in obtaining purely discretionary relief." *Id.* at 8 (quoting *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004)). The court concluded that "'because cancellation of removal is a form of discretionary relief,' petitioner '[could] not raise a due process challenge to [the] denial of his application for cancellation of removal.'" *Ibid.* (emphasis omitted) (quoting *Dave*, 363 F.3d at 653).

The court also stated that even if petitioner "could invoke due process," it was "not persuaded that any of the purported violations he has identified have merit." Pet. App. 8. Specifically, the court rejected petitioner's argument that the Board's affirmance without opinion

violated due process, observing that "the process employed by the [Board] in petitioner's case, i.e., of having a single member affirm, without opinion, the IJ's decision, is clearly authorized by regulation." *Id.* at 9 (citing 8 C.F.R. 1003.1(e)(4)). The court noted that "petitioner has failed to explain how this procedure could possibly give rise to a due process violation when * * * '[a]n alien has no constitutional right to any administrative appeal at all.'" *Ibid.* (brackets in original) (quoting *Yuk* v. *Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004)).

ARGUMENT

Petitioner argues that the court of appeals had jurisdiction to review whether the Board violated its own regulations in affirming petitioner's administrative appeal without an opinion under 8 C.F.R. 1003.1(e)(4). The Board's application of the streamlining regulations, petitioner contends, is not committed to agency discretion by law under the Administrative Procedure Act (APA), 5 U.S.C. 701(a)(2). Pet. 6-8. Petitioner did not raise this contention before the court of appeals, and the court did not address it. As a result, the conflicts among the courts of appeals that petitioner asserts are not implicated by this case. Further review is unwarranted.

1. a. The court of appeals correctly held that under 8 U.S.C. 1252(a)(2)(B)(i), it had no jurisdiction to review the BIA's denial of petitioner's application for cancellation of removal. Pet. App. 7 (citing 8 U.S.C. 1252(a)(2)(D)). The INA provides that "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief" under Section 1229b, which governs cancellation of removal. 8 U.S.C. 1252(a)(2)(B)(i); see *Kucana* v. *Holder*, No. 08-911 (Jan. 20, 2010), slip op. 12-13.

The court of appeals also correctly found that petitioner could not avail himself of the statutory exception permitting federal-court review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). Pet. App. 7. The court correctly rejected petitioner's attempt to recast as due process claims his challenges to the IJ's factual findings and his discretionary decision denial of discretionary relief, reasoning that petitioner had no entitlement to discretionary relief and therefore could not raise "a due process challenge to [the] denial of his application for cancellation of removal." *Id.* at 8 (brackets in original) (citing *Dave* v. *Ashcroft*, 363 F.3d 649, 652-653 (7th Cir. 2004)). In addition, as the court noted, *ibid.*, petitioner's primary arguments were simply challenges to the IJ's factual findings and its discretionary decision, and recasting such contentions as due process claims is "insufficient to give [the] Court jurisdiction under [Section] 1252(a)(2)(D)." *Id.* at 8-9 (citing *Jarbough* v. *Attorney Gen.*, 483 F.3d 184, 190 (3d Cir. 2007)).

b. The court of appeals also correctly rejected petitioner's argument that the BIA's affirmance without opinion under 8 C.F.R. 1003.1(e)(4) violated his due process rights. Neither the Constitution nor the INA imposes a requirement that appeals be affirmed by opinion or heard by multi-member panels. Aliens have no constitutional right to an administrative appeal of removal orders, and therefore no due process right to a particular procedure for considering appeals. Pet. App. 9 (citing *Yuk* v. *Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004)). Nor does the INA impose any requirements concerning the procedure for administrative appeals; it simply provides that an IJ shall inform an alien of the right to appeal the IJ's order of removal, 8 U.S.C. 1229a(c)(4),

and of the fact that the IJ's order of removal will become final if an appeal is not taken, 8 U.S.C. 1101(a)(47)(A) and (B).

In addition, this Court has made clear that "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) (citation and internal quotation marks omitted). The government thus could, consistently with due process and the INA, provide that all appeals from orders of removal are to be adjudicated by a single member of the Board, as is the case in many other administrative schemes. See *Falcon Carriche* v. *Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) (noting that even when the Board streamlines a case, the alien still has a right to a full and fair hearing before the IJ, as well as the opportunity to present his arguments to the Board for a decision by a Board member, and that the argument that aliens are "entitled to an additional procedural safeguard" has "no support in the law"); cf., *e.g.*, 7 C.F.R. 1.132, 1.145 (providing that decisions of administrative law judges are appealed to a single "judicial officer" acting for the Secretary of Agriculture).[2]

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[2] Although petitioner suggests (Pet. 28-29) that streamlining has particularly severe effects in cases like this one, in which the court of appeals has no jurisdiction to review the Board's final order, petitioner received an extensive hearing before the IJ and a full opportunity to brief his appeal before a member of the BIA. See *Falcon Carriche*, 350 F.3d at 845-850 (rejecting due process challenge to streamlining regulations in case in which the court had no jurisdiction to review decision denying cancellation of removal). In addition, the fact that the BIA member affirms without opinion does not suggest that the BIA member gave less than full and fair consideration to the issues raised. Cf.

The court of appeals' conclusion that the BIA's procedure for affirming certain appeals without opinion does not give rise to due process concerns is consistent with the decisions of all of the other courts of appeals to consider the issue. See *Falcon Carriche*, 350 F.3d at 845 (noting that affirmance without opinion pursuant to streamlining regulations does not impede court's ability to review IJ's findings and conclusions); see also, *e.g.*, *Zhang* v. *United States Dep't of Justice*, 362 F.3d 155, 157-158 (2d Cir. 2004) (noting that appellate courts regularly issue summary affirmances); *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272 (4th Cir. 2004); *Albathani* v. *INS*, 318 F.3d 365, 375-378 (1st Cir. 2003); *Dia* v. *Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc); *Soadjede* v. *Ashcroft*, 324 F.3d 830, 832 (5th Cir. 2003) (per curiam); *Denko* v. *INS*, 351 F.3d 717 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962 (7th Cir. 2003); *Loulou* v. *Ashcroft*, 354 F.3d 706, 708-709 (8th Cir. 2003), cert. denied, 543 U.S. 487 (2004); *Mendoza* v. *United States Att'y Gen.*, 327 F.3d 1283 (11th Cir. 2003).

2. Petitioner's sole contention before this Court (Pet. i, 31-36) is that, notwithstanding the court of appeals' holding that it lacked jurisdiction under Section 1252(a)(2)(B)(i) to review petitioner's challenges to the BIA's final order, the court had jurisdiction to review the Board's antecedent procedural ruling that petitioner's administrative appeal should be affirmed without opinion, rather than processed under one of the other procedures set forth in the streamlining regulations. Petitioner argues that the court had jurisdiction to review the BIA's compliance with 8 C.F.R.

Furman v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983) (per curiam) (considering summary orders by the court of appeals).

1003.1(e)(4) because it is a question of law under Section 1252(a)(2)(D), and the APA provides jurisdiction to review agency actions that are not "committed to agency discretion by law," 5 U.S.C. 701(a)(2).

Petitioner did not raise this argument below, see Pet. C.A. Br. 4-6, 34-42, and the court of appeals did not address it. Rather, the court held only that it had no jurisdiction over petitioner's general challenge to the merits of the IJ's final order denying cancellation of removal under Section 1252(a)(2)(B)(i). This Court thus has no decision before it to review on the issue petitioner seeks to raise, and it should decline to consider petitioner's contentions in the first instance. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (this Court ordinarily does not consider questions not pressed or passed upon below); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In addition, because the court of appeals did not address whether it had jurisdiction to review the BIA's application of the criteria set forth in 8 C.F.R. 1003.1(e)(4), the asserted circuit conflict that petitioner identifies is not implicated by this case. All of the decisions that petitioner describes as creating a circuit conflict addressed the question whether, when the court had jurisdiction to review the alien's challenges to the BIA's final removal order, the court also had jurisdiction to review the BIA's decision that the administrative appeal should be processed under 8 C.F.R. 1003.1(e)(4)—rather than under any of the other procedures set forth in the streamlining regulation—or whether the streamlining decision was committed to agency discretion under the APA, 5 U.S.C. 701(a)(2), and therefore unreviewable. See, *e.g.*, *Smriko* v. *Ashcroft*, 387 F.3d 279, 294-296 (3d Cir. 2004) (where court had jurisdiction over final

BIA order, holding that review of BIA's decision that streamlining was appropriate was available under the APA); *Chong Shin Chen* v. *Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004) (holding that court could review propriety of decision to affirm without opinion where that decision was based on the conclusion that no novel legal issue was raised); *Haoud* v. *Ashcroft*, 350 F.3d 201, 205 (1st Cir. 2003) (suggesting that BIA's decision that petitioner's case was appropriate for streamlining was not committed to agency discretion; remanding for explanation when affirmance without opinion made it impossible to discern whether BIA's removal order rested on a ground reviewable under the INA); *Kambolli* v. *Gonzales*, 449 F.3d 454, 458 (2d Cir. 2006) (stating, after concluding that alien's asylum claims were meritless, that streamlining decision was unreviewable because it is committed to agency discretion); *Ngure* v. *Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004) (in asylum case, stating that in certain circumstances, decision to streamline "a particular case is committed to agency discretion and not subject to judicial review"); *Tsegay* v. *Ashcroft*, 386 F.3d 1347, 1355-1356 (10th Cir. 2004) (holding, in asylum case, that streamlining decision is committed to agency discretion).[3]

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[3] In three of the decisions on which petitioner relies, the court did not decide whether a decision that an appeal should be resolved under 8 C.F.R. 1003.1(e)(4) was reviewable. See *Zhu* v. *Ashcroft*, 382 F.3d 521 (5th Cir. 2004) (remanding to BIA because court could not discern whether BIA's decision rested on a reviewable basis, without deciding whether application of streamlining was reviewable); *Denko*, 351 F.3d at 732 (assuming without deciding that streamlining decision was reviewable because that question did not matter to outcome); *Georgis*, 328 F.3d 967 (declining to decide issue because it made no practical difference and court could review IJ's denial of asylum).

The decision below, in contrast, rests solely on the ground that the court lacked jurisdiction over petitioner's challenges to the BIA's discretionary decision to deny cancellation of removal under Section 1252(a)(2)(B)(i). It does not address the question of a court of appeals' jurisdiction to review a single Board member's decision to streamline a case. Therefore, even if that issue otherwise warranted review by this Court, this case would not provide a vehicle in which to do so.[4]

3. In any event, petitioner's argument that the court of appeals had jurisdiction to review the Board's compliance with the streamlining regulations does not have merit.

a. Contrary to petitioner's argument (Pet. 33-36), the Board's application of the streamlining regulations is committed to agency discretion by law. 5 U.S.C. 701(a)(2). Regulations that govern the "agency's decision about how to allocate its scarce resources to accomplish its complex mission," rather than creating individual rights or entitlements, are "traditionally * * * free from judicial supervision." *Ngure*, 367 F.3d at 983. The streamlining regulations fall into this category: they are directed to the agency's internal administration and are designed to assist the agency in carrying out its functions, *American Farm Lines* v. *Black Ball Freight*

[4] Petitioner also argues (Pet. 19-23) that this Court should grant review in order to provide guidance regarding an asserted circuit conflict concerning whether courts of appeals may review a single BIA member's refusal to refer an appeal to a three-judge panel under 8 C.F.R. 1003.1(e)(6). Petitioner did not raise before the court of appeals any challenge to the BIA's compliance with its regulations in deciding not to refer his appeal to a three-member panel, see Pet. C.A. Br. 16 (stating that referral to a panel is "within the sole jurisdiction of the Board"), and therefore this contention does not merit review.

Serv., 397 U.S. 532, 539 (1970); they are not intended to confer procedural or substantive rights on individuals, see 64 Fed. Reg. at 56,138 (regulations will "allow the Board to manage its caseload"). Indeed, the regulations provide that when the Board utilizes the affirmance-without-opinion procedure, "for purposes of judicial review * * * the [IJ's] decision becomes the decision reviewed." *Ibid.* The Attorney General's view that the streamlining regulations create no judicially enforceable rights is "controlling," as it is neither "plainly erroneous [n]or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

In addition, the Board's decision to apply the affirmance-without-opinion procedure to a particular case is not susceptible to a "meaningful and adequate standard of review," *Ngure*, 367 F.3d at 985, because determining whether the appeal is governed by Board precedent or presents substantial legal issues, see 8 C.F.R. 1003.1(e)(4), would necessarily implicate review of the merits of the Board's denial of relief. See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 279 (1987) (ICC's decision not to reopen a prior action on grounds of material error would merge with review of the merits and was therefore not independently reviewable).

Finally, a Board member's decision that a particular case presents a sufficiently "substantial" issue to warrant a written opinion, 8 C.F.R. 1003.1(e)(4)(i)(B), rests on the Board member's knowledge about the Board's limited resources, and her expertise as to whether a published decision in a particular case, rather than in other cases presenting the same issue, would advance the administration of the immigration system and the development of the law. See *Ngure*, 367 F.3d at 986.

The determination to affirm without opinion is therefore committed to agency discretion by law. 5 U.S.C. 701(a)(2).

b. Even if petitioner were correct that the BIA's application of 8 C.F.R. 1103.1(e)(4) is not committed to agency discretion, the court of appeals would have lacked jurisdiction to review the BIA's streamlining decision for an independent reason.

The APA restricts judicial review to "final agency action," 5 U.S.C. 704, and the BIA's decision to adjudicate petitioner's administrative appeal under 8 C.F.R. 1003.1(e)(4) was an interlocutory procedural decision. Although the APA provides that a procedural agency action or ruling "is subject to review on the review of the final agency action," 5 U.S.C. 704, here the INA expressly deprived the court of appeals of jurisdiction to review the final agency action. See 8 U.S.C. 1252(a)(2)(B)(i). Because the court held that it lacked jurisdiction to review petitioner's challenges to the final agency decision in this case, it also would have lacked jurisdiction to review the intermediate procedural decision concerning streamlining that preceded the final order. See *Falcon Carriche*, 350 F.3d at 854 ("Because we lack jurisdiction to review the merits of [the alien's challenge to] the IJ's discretionary decision regarding * * * cancellation of removal[,] * * * we are also without jurisdiction to evaluate whether streamlining was appropriate.").

Petitioner contends (Pet. 33) that he may invoke Section 1252(a)(2)(D)'s exception to the jurisdictional bar to raise a legal challenge to the procedural decision under 8 C.F.R. 1003.1(e)(4), even though the court lacks jurisdiction over petitioner's challenges to the Board's final action. But reviewing the Board's compliance with the

criteria set forth in 8 C.F.R. 1003.1(e)(4)—for instance, whether the issue is governed by BIA precedent and does not raise substantial factual issues, 8 C.F.R. 1003.1(e)(4)—would essentially require the court to review the merits of the IJ's discretionary decision to deny cancellation of removal. That is precisely what Congress precluded in Section 1252(a)(2)(B)(i). See *Falcon Carriche*, 350 F.3d at 853-854.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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